



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-04-02

### QUESTION

May a state college professor assign to his students textbooks he has written and receive royalties or other financial benefits from the students' purchase of the textbooks?<sup>1</sup>

### ANSWER

Yes, provided he first receives a written determination from his appointing authority pursuant to G.L. c. 268A, § 6 allowing him to assign his own textbooks to his students.

### FACTS

You are a professor at a state college and a state employee. The vice-president for academic affairs/provost appoints you to your position.

You have written certain textbooks that you wish to assign students to use in your college course. These textbooks have been both commercially published and self-published. You would either sell the textbooks to your students directly or have your students order the textbooks through the college bookstore.

A private management company runs the college bookstore under a contract with the college. The college bookstore is required to stock all required and recommended textbooks for each course offered at the college. You provide the name of the book(s) selected for your course to the bookstore, which orders the book(s) directly from the publisher. On your commercially published books, you are paid a royalty by the publisher for each sale of your book per your contract with the publisher. The bookstore returns all unsold books to the publisher.

The college administration does not participate in the decision as to what textbook should be used for a course; rather, under the collective bargaining agreement, the professor has the freedom to choose what materials are used for his class.

### DISCUSSION

As a professor in the state college system, you are a special state employee.<sup>2</sup> Section 6 of c. 268A, in part, prohibits a state employee, including a special state

employee, absent a disclosure and appointing authority determination, from participating<sup>3</sup> in any particular matter<sup>4</sup> in which he or any business organization in which he is serving as an officer, director, trustee, partner or employee, has, to his knowledge, a financial interest. As the Commission has recognized, this section “embodies what has been described as “the most obvious of all conflict-of-interest principles—namely, that a public official does not act in his official capacity with respect to matters in which he has a private stake.”<sup>5</sup>

Section 6 encompasses any financial interest without regard to the size of said interest or whether the financial interest is positive or negative.<sup>6</sup> The financial interest, however, must be direct and immediate or reasonably foreseeable.<sup>7</sup> Financial interests that are remote, speculative or not sufficiently identifiable do not raise an issue under § 6.<sup>8</sup>

The choice of the textbooks to be used in one’s classes is a particular matter. Obviously, when you decide what books to use, you personally and substantially participate in that particular matter. Further, when you decide to assign textbooks you have written you know that you have a reasonably foreseeable financial interest in your decision as you will either receive royalties from the sale or be paid directly by your students. The Commission has previously held that a public school teacher would have violated § 19 (the municipal counterpart of § 6) had she participated in the school department’s selection of a textbook she had written where she would receive royalties from the sales.<sup>9</sup> Therefore, you may not, as a state college professor, assign textbooks you have written to your students unless you first receive a written determination from your appointing authority as discussed below.

Section 6 provides that: “Any state employee whose duties would otherwise require him to participate in a particular matter in which he has a financial interest shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest. The appointing official shall thereupon either

- (1) assign the particular matter to another employee, or
- (2) assume responsibility for the particular matter, or
- (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter.”<sup>10</sup>

The Commission has advised public officials that:

the requirement that the disclosure and authorization be in writing serves at least two purposes. First, it establishes a record of both the disclosure and subsequent determination of the appointing authority, a

record that, among other things, protects the interest of the [public] employee if allegations of impropriety should arise. Second, it forces both the [public] employee and the appointing authority to consider carefully the nature of the conflict of interest and the options available for dealing with that conflict....These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure-particularly that the determination be in writing . . .are designed to prevent an appointing authority from making an unformed, ill-advised or badly motivated decision.<sup>11</sup>

In order for you to assign textbooks that you have written and from whose sale you will financially benefit, you must first fully disclose and receive a written determination from your appointing authority (the vice-president for academic affairs/provost) consistent with the statutory language of § 6 indicating that you may participate because your financial interest in the textbook selection decision is not so substantial as to affect the integrity of your service to the Commonwealth. Your disclosure must include a description of the decision that you are going to make concerning your textbooks and the amount of the royalties you will receive from the proposed sales or, for self-published works, the price you will charge your students to purchase the textbook(s). The conflict of interest law grants the appointing authority the discretion to review the disclosure and to give a written determination. Copies of this disclosure and the appointing authority's written determination should be forwarded to the Commission.

We note that public colleges from other jurisdictions have been faced with similar situations involving the sale of required course materials to students. While educational institutions wish to encourage the authorship of instructional materials, conflict of interest issues arise particularly where teachers financially profit from the required sale of such materials to their students. To avoid even the appearance that a teacher is exploiting his students for personal financial gain, some public institutions have implemented various protocols to address potential conflicts, misuse of office and impairment of independent judgment. For example, the University of Connecticut established a review system whereby a board of independent individuals (typically faculty members), not subordinate to the teacher, evaluate, in advance, a teacher's request to utilize his own materials in his class. When the board completes the review, agrees with the recommended educational materials, and makes a determination report filed with the chancellor's office, then the teacher may retain any profits made from the sale of materials he authored. If the teacher directs any financial gain to a student scholarship fund, no review is required. The Commission is available to assist should your state college be interested in adopting such a conflict of interest protocol.

In closing, we recognize that the state college professors' collective bargaining agreement gives professors freedom to select the materials they will use in their classes. We emphasize that G.L. c. 268A, § 6 does not prohibit a state college professor from selecting his own or any other textbook. What § 6 requires, prior to such selection, when one's financial interest will be affected by the decision, is a full

disclosure and a review by one's appointing authority in order to protect the integrity of government decision-making.<sup>12</sup>

**DATE AUTHORIZED:** March 31, 2004

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<sup>1</sup> Although this opinion focuses on textbooks, the same principles apply to other instructional materials selected by a state college professor to be used as part of a course where the professor financially benefits from the sale to the students. Such materials would include but not be limited to copied resources and computer discs.

<sup>2</sup> In 1983, the Board of Higher Education certified that professors in the state college system were, by the terms and conditions of their employment, permitted personal or private employment during normal working hours, thus making state college professors special state employees. G.L. c. 268A, § 1(o)(2)(a). Under this portion of § 1, "[s]pecial state employee", a state employee: . . . who is not an elected official and occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment . . ."

<sup>3</sup> "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j).

<sup>4</sup> "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

<sup>5</sup> In re Craven, 1980 SEC 17, 21 (citing W.G. Buss, "The Massachusetts Conflict-of-Interest Statute: An Analysis," 45 B.U.L. Rev. 299, 353 (1965)).

<sup>6</sup> See, e.g., EC-COI-91-14.

<sup>7</sup> See, e.g., EC-COI-89-19; 87-16.

<sup>8</sup> See, e.g., EC-COI-92-12; 90-14; 89-33; 89-5.

<sup>9</sup> EC-COI-88-10.

<sup>10</sup> "Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the Commission for a period of six years." G.L. c. 268A, § 6.

<sup>11</sup> In re Ling, 1990 SEC 456 at 459. See EC-COI-92-3.

<sup>12</sup> While G.L. c. 268A, § 7 prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency, such as the contract between the private bookstore and the state college, writing and research are clearly contemplated as part of the state college professor's primary employment arrangement with the college. As stated in the collective bargaining agreement, "Academic

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freedom is the right of scholars in institutions of higher education freely to study, discuss, investigate, teach, exhibit, and publish." Therefore, any royalties received will not be considered an additional financial interest, other than one's financial interest in one's employment arrangement. *EC-COI-88-10* (municipal school teacher may receive royalties from sale of books to his school district). As the Commission indicated in *EC-COI-88-10*:

Our willingness to defer to the School Committee rests on the fact that the preparation of written materials for educational purposes is an endeavor which is traditionally undertaken by teachers and which often is relevant to the evaluation of teacher performance. Thus, while under normal circumstances receipt of royalties could not reasonably be characterized as additional compensation contemplated by the employment contract, this important component of a teacher's professional activity is deserving, in the Commission's view, of particularly consideration in interpreting the terms of the collective bargaining agreement and the requirements of G.L. c. 268A, § 20 (the municipal counterpart of § 7). *EC-COI-88-10* at n.2.